CALLING TIME: THE CASE FOR ENDING PREFERENTIAL ANTITRUST TREATMENT OF NCAA AMATEURISM RULES AFTER *ALSTON*

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As part of its role as the governing body of collegiate athletics in the United States, the NCAA imposes rules that regulate both the behavior of its member-institutions and of college athletes themselves. Historically, courts have divided these rules into two groups: rules governing the commercial aspects of sport and rules that enforce the amateur nature of college athletics. Thus, rules concerning television-rights contracting are distinguished from those rules regulating the size of a soccer field or when a student-athlete is eligible to play. When NCAA rules have been challenged as violations of U.S. antitrust law, courts applying the standard rule-of-reason antitrust analysis have often found an anticompetitive effect. But where amateurism rules are concerned, a subset of circuit courts have withheld a rigorous application of the rule of reason and allowed NCAA regulations to stand under the "presumption of procompetitiveness" doctrine.

In May 2020, in Alston v. NCAA, the Ninth Circuit applied the rule of reason and struck down NCAA limits on athlete compensation through so-called "grant-in-aid," the scholarship packages that colleges and universities provide to athletes. The United States Supreme Court affirmed the Ninth Circuit a year later, confirming its holding and underlying analytical framework. These decisions did not directly reach the presumption of procompetitiveness applied by the Seventh Circuit and other courts when reviewing NCAA amateurism rules. This Note, however, argues that the Supreme Court's stated preference for applying the rule of reason, and the NCAA's own slippery definition of "amateurism," strongly suggest that the presumption of procompetitiveness mistakenly lowers the level of scrutiny that NCAA regulations receive from courts. This Note concludes that amateurism cannot justify a light-touch approach to any NCAA rules. Thus, conformity with the law, and fairness to the position of student-athletes, requires that all NCAA rules be examined under the traditional rule-of-reason framework.

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I. INTRODUCTION

Buried among the surprises of the spring of 2020 was an increasingly unsurprising bit of news: a federal court overturned a National Collegiate Athletic Association ("NCAA") rule for violations of U.S. antitrust law. Over the last forty years, numerous antitrust challenges to NCAA rules—many justified by the need to defend the amateur status of college athletics[1]—have resulted in a succession of defeats for the NCAA and its rule-making regime.[2] Primarily, these defeats have been limited to the realm of the NCAA's "compensation" rules, which are designed to restrict how athletes or universities receive money for participation in, or sponsorship of, college athletics.[3] The NCAA also promulgates "eligibility" or "amateurism" rules, which regulate most other aspects of college sports from educational requirements to scholarship packages.[4] Rules placed in this bucket—such as those regulating the processes for recruiting or transferring between schools[5]—have largely been spared from court interference when challenged as unreasonable restraints of trade under the Sherman Antitrust Act.[6]

1. NAT'L COLLEGIATE ATHLETIC ASS'N, 2020–21 NCAA DIVISION I MANUAL § 1.2(c) (2020), https://www.ncaapublications.com/productdownloads/D121.pdf [https://perma.cc/AVK5-9824].

2. *See* NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 88 (1984) (holding that the NCAA's rules governing the televising of football games unreasonably restrained trade under the Sherman Act); O'Bannon v. NCAA, 802 F.3d 1049, 1079 (9th Cir. 2015) (holding that NCAA compensation rules regulating athlete compensation were unreasonable restraints on trade).

3. *See, e.g.*, NAT'L COLLEGIATE ATHLETIC ASS'N, *supra* note 1, at Art. 16 (2020).

4. *See id.* at §§ 12.01.4, 14.01.1.

5. *Id.* at § 14.5.

6. *See, e.g.*, Deppe v. NCAA, 893 F.3d 498, 503–04 (7th Cir. 2018).

This situation—where one class of rules generally survives challenge while the other fails—is hardly due to luck. Following the Supreme Court's 1984 ruling in *Board of Regents v. NCAA*, which has served as the foundational case for litigating NCAA antitrust issues, many lower courts have developed a line of cases that endorse preferential treatment for the NCAA's amateurism and eligibility rules. This treatment, known as the "presumption of procompetitiveness" doctrine, has allowed the NCAA to skirt serious judicial inquiry into the competitiveness of its rules and regulations when it can proffer a colorable claim that the rule is necessary for promoting the amateur character of college athletics.[7]

The NCAA's rules, particularly its amateurism-based justifications for many of its rules, have come under intense scrutiny.[8] Critics of the NCAA frequently focus their frustrations on the dichotomy between the ever-growing revenues derived by the NCAA and its member institutions from college athletics[9]—largely the high-revenue sports of football and men's basketball[10]—and the NCAA's general refusal to expand athlete compensation beyond educational scholarship packages.[11] This criticism is valid and goes directly to the bugbear that has stalked the NCAA since its very founding: how to reconcile the presence of money in sports with its idealized vision of amateur athletics.[12] But the uproar over compensation often misses a larger point: that the NCAA has built a wider web of restrictions on student-athletes. These rules endure based on the amorphous and judicially sanctioned rationale that such regulations—ranging from mandatory waiting periods after transferring between schools[13] to recission of eligibility for athletes who agree to be represented by an agent[14]—are necessary for the maintenance of amateurism in college sports. In jurisdictions that have adopted the presumption of procompetitiveness doctrine, the ability of a court to reach the legality of NCAA rules like these in an antitrust review is severely constrained, regardless of the anticompetitive effect the rules may actually have within the college sports market.

7. Roger D. Blair & Wenche Wang, *The NCAA's Transfer Rules: An Antitrust Analysis*, 11 HARV. J. SPORTS & ENT. L. 1, 6 (2020).

8. *See Should the NCAA Be Abolished?*, WALL ST. J. (Oct. 27, 2020, 12:00 PM), https://www.wsj.com/articles/should-the-ncaa-be-abolished-11603814400 [https://perma.cc/WJ73-T4PN]; Robert Litan, *The NCAA's "Amateurism" Rules: What's in a Name?*, MILKEN INST. REV. (Oct. 28, 2019), https://www.milkenreview.org/articles/the-ncaas-amateurism-rules [https://perma.cc/X2PY-D3M5]; Zach Braziller, *Critics Not Sold on NCAA's New Rule Allowing Athletes to Cash In*, N.Y. POST (Oct. 29, 2019, 9:08 PM), https://nypost.com/2019/10/29/critics-not-sold-on-ncaas-new-rule-allowing-athletes-to-cash-in/ [https://perma.cc/Y4AE-SBHW].

9. Litan, *supra* note 8.

10. *Id.*

11. George F. Will, *Opinion: The NCAA's Shameless Excuses for Denying 'Student-Athletes' the Money They Earn*, WASH. POST (Nov. 15, 2019, 1:26 PM), https://www.washingtonpost.com/opinions/the-ncaa-is-a-cafeteria-of-embarrassments/2019/11/15/668e2c80-071b-11ea-8292-c46ee8cb3dce_story.html [https://perma.cc/Z2LW-VUK3].

12. Rodney K. Smith, *A Brief History of the National Collegiate Athletic Association's Role in Regulating Intercollegiate Athletics*, 11 MARQ. SPORTS L. REV. 9, 13 (2000) (quoting from the 1929 Carnegie Foundation report).

13. NAT'L COLLEGIATE ATHLETIC ASS'N, *supra* note 1, at § 14.5.1.

14. *Id.* at § 12.3.1.

Following the decision of the Ninth Circuit Court of Appeals in *Alston v. NCAA* ("*Alston I*"), a genuine split emerged within the federal circuit courts as to the status of the NCAA's amateurism rules—particularly those governing compensation.[15] The NCAA appealed *Alston I*,[16] and for the first time since *Board of Regents*, the Supreme Court granted certiorari on a question regarding NCAA rules.[17] While the Court's recent decision in the case ("*Alston II*") helped clarify the antitrust concerns surrounding educational benefits, it did not deeply venture into the broader conflict surrounding amateurism rules.[18] It did, however, present a new opportunity for courts to shift the way they analyze NCAA amateurism and eligibility rules more broadly under the Sherman Act's rule-of-reason framework. Although the *Alston I* and *Alston II* rulings are limited to the question of whether NCAA limits on educational benefits—known as "grant-in-aid"—violated the Sherman Act, they offer a forceful rebuttal to the argument that applying the full rule-of-reason test to rules rooted in amateurism concerns is unnecessary under *Board of Regents*.[19] This holding clashes with what other courts, such as the Seventh Circuit in its decision in *Deppe v. NCAA*, have argued—that the NCAA's amateurism justification for eligibility rules should remain presumptively procompetitive and exempt from a full application of the Sherman Act's rule of reason.[20]

This Note argues that it is inappropriate to extend such a presumption of procompetitiveness and that to properly balance the competing demands of competition law, amateurism, and the financial realities of college athletics, a preferential approach would be to subject the whole body of NCAA rule-making to a standard rule-of-reason analysis under the Sherman Act, irrespective of the rule's classification.

Part II of this Note examines the development of the NCAA and its rule-making regime, the development of antitrust law in the United States, and how antitrust law has been applied to different types of NCAA rules. Part III analyzes the implications and desirability of different approaches to scrutinizing NCAA eligibility rules through the frameworks advanced in the *Deppe* and *Alston* decisions and in light of the *Board of Regents* holding. Part IV recommends that courts dispense with the presumptively procompetitive approach to reviewing eligibility rules and instead employ a standard rule-of-reason analysis in order to both adhere to the *Board of Regents* holding and to better respond to the changing definition of amateurism and other developments in the modern college-athletics marketplace.

15. *Compare* 958 F.3d 1239, 1244 (9th Cir. 2020) (holding that the NCAA's limits on grant-in-aid were anticompetitive), *with* Deppe v. NCAA, 893 F.3d 498, 499 (7th Cir. 2018) (holding that the NCAA's year-in-residence rule was presumptively procompetitive).

16. Petition for a Writ of Certiorari at (i), *NCAA v. Alston* ("*Alston II*"), 141 S. Ct. 2141, 2147 (2021) (No. 20-512).

17. Associated Press, *Supreme Court Agrees to Hear NCAA Athlete Compensation Case*, ESPN (Dec. 16, 2020), https://www.espn.com/college-sports/story/_/id/30530625/supreme-court-agrees-hear-ncaa-athlete-compensation-case [https://perma.cc/4LKA-KTGH].

18. 141 S. Ct. at 2166 (Kavanaugh, J., concurring).

19. *Alston I*, 958 F.3d at 1258; *Alston II*, 141 S. Ct. at 2158.

20. *E.g.*, 893 F.3d at 503–04.

II. BACKGROUND

A. Formation and Development of the NCAA

Organized college sports in the United States began slowly, but when interest in intercollegiate athletics began to crystallize starting in the 1840s, the organizing bodies first came from the students themselves, rather than from authorities at the university or supra-university level.[21] This state of affairs radically changed in 1905 when, following the deaths of numerous college football players and the intervention of President Roosevelt, the NCAA was founded to establish a set of uniform rules to govern intercollegiate football.[22] Altogether, sixty-two schools signed onto this original compact to create what was first known as the Intercollegiate Athletic Association, renamed to the more-familiar NCAA in 1910.[23] From that modest number, the NCAA has grown to oversee athletics for 1,098 member institutions, organized into 102 conferences, across three competitive divisions.[24] Of these schools, the most lucrative and competitive programs are organized into "Division I," which includes such well-known institutions as the University of Michigan and the University of Alabama at Tuscaloosa.[25]

Although safety concerns generated much of the initial urgency to create the NCAA, broader concerns about the moral integrity and distinct character of college sports were also of prime interest to the organization from the beginning.[26] As part of the 1906 Intercollegiate Athletic Association convention, the delegates adopted a set of "Principles of Amateur Sport" and called upon member institutions to prevent violations of these principles.[27] Among other activities, these provisions banned "[t]he offering of inducements to players to enter Colleges or Universities because of their athletic abilities," prohibited the fielding "of those ineligible as amateurs [and] those who are not bona-fide students in good and regular standing," and instituted the familiar tenet of amateurism that "no student shall represent a college or university in an intercollegiate game or contest who is paid or receives, directly or indirectly, any money or financial concession . . . whether paid by . . . any . . . college or University, or any individual whatever."[28] Thus, from the very beginning, the amateurism rationale for the NCAA's rule-making was concerned with

21. Guy Lewis, *The Beginning of Organized Collegiate Sport*, 22 AM. Q. 222, 229 (1970).

22. Smith, *supra* note 12, at 12.

23. *Id.*

24. *What is the NCAA?*, NCAA, http://www.ncaa.org/about/resources/media-center/ncaa-101/what-ncaa (last visited June 1, 2022) [https://perma.cc/3ULS-WUEY].

25. *Full List of Division 1 Football Teams: Find the Right Team for Your Athletic and Academic Goals*, NCSA, https://www.ncsasports.org/football/division-1-colleges (last visited June 1, 2022) [https://perma.cc/LX5S-LRZF].

26. W. Burlette Carter, *The Age of Innocence: The First 25 Years of the National Collegiate Athletic Association, 1906 to 1931*, 8 VAND. J. ENT. & TECH. L. 211, 229–30 (2006).

27. *Id.* at 222–23.

28. *Id.*

regulating both the compensation of, and eligibility for, participation in college sports.[29]

Today, many of these early amateurism concerns remain an integral part of the NCAA's modern definition of amateurism.[30] The NCAA declared in the "Principle of Amateurism" that: "Student-athletes shall be amateurs in an intercollegiate sport, and their participation should be motivated primarily by education and by the physical, mental and social benefits to be derived. Student participation in intercollegiate athletics is an avocation, and student-athletes should be protected from exploitation by professional and commercial interests."[31] As in its founding era, the NCAA today remains keenly interested in staving off professional influence, preserving its educational mission, and keeping money and sport separate from one another.[32]

It is worth noting that despite the NCAA's earnest commitment to amateurism, this concept in early American collegiate athletics was not the orthodox dogma that it would later become.[33] In a famous episode from the infancy of organized American college sports, Harvard's rowing team "recruited a rower who had already graduated" in advance of the 1855 Harvard-Yale regatta.[34] Furthermore, in football—long a target of college athletics reformers[35]—Walter Camp, who coached Yale from 1876 to 1909, maintained a $100,000 slush fund and "shamelessly imported ringers . . . who found themselves matriculated at different universities weeks or months later."[36] Thus, in the founding era of college sports, practices that resembled those in use on the professional stage were not only present, but in fact openly and widely adopted.[37]

With the desire to foster ideals of amateurism within college sports, the early NCAA looked to Europe for ideological firepower.[38] There, the belief in the superiority of amateur competition—the belief that would likewise spawn the Olympic Games and guide Europe's approach to sport throughout the nineteenth and much of the twentieth centuries[39]—promised a purity of competition, albeit with distinct elitist, classist,[40] and arguably even racist

29. *See id.*, at 229–30.

30. NAT'L COLLEGIATE ATHLETIC ASS'N, *supra* note 1, at § 2.9.

31. *Id.*

32. *Compare id.* (describing the NCAA's principle of amateurism), *with* Carter, *supra* note 26, at 229–30 (exploring the motivations surrounding the foundation of amateurism in the U.S., including the ideals of "morality and fair play").

33. *See, e.g.*, NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 120 (1984).

34. Kelly Charles Crabb, *The Amateurism Myth: A Case for a New Tradition*, 28 STAN. L. & POL'Y REV. 181, 189 (2017).

35. *See, e.g.*, Carter, *supra* note 26, at 215–17.

36. Warren Goldstein, *Walter Camp's Off-Side: A Tarnished Football Legacy*, HARTFORD COURANT (Mar. 14, 2014, 7:11 PM), https://www.courant.com/opinion/op-ed/hc-op-commentary-goldstein-yales-walter-camp-bent--20140314-story.html [https://perma.cc/R8Y6-RFFF].

37. *See id.*

38. Carter, *supra* note 26, at 229.

39. Brian L. Porto, *Neither Employees nor Indentured Servants: A New Amateurism for a New Millennium in College Sports*, 26 MARQ. SPORTS L. REV. 301, 305 (2016).

40. *See* Kenneth L. Shropshire, *The Erosion of the NCAA Amateurism Model*, 14 ANTITRUST 46, 48 (2000).

overtones.[41] But even at this early stage, aspects of this European import clashed with the reality of sport in America.[42] The British mode of amateurism was an especially unlikely model, as it descended from competition between only two institutions, Oxford and Cambridge, and rejected any attempts at professionalization.[43] In America, meanwhile, the college sports landscape became populated with more than 1,000 institutions, and from the beginning it idealized fierce competition far more than notions of athletic purity.[44]

Despite the initially narrow focus on reforming football rules, the NCAA gradually took on a much larger role in regulating college athletics.[45] Regulations imposed during its first few decades included new eligibility rules like "the allowable length of participation," maintaining "full-time student status," and curbs on "financial remuneration" for student-athletes.[46] In particular, NCAA regulation of athletics has quickly expanded with the growing public interest in and deepening commercialization of college sports.[47] In 1929, the Carnegie Foundation for the Advancement of Education issued a scathing report on the state of college athletics, declaring that a "change of values is needed in a field that is sodden with the commercial and the material and the vested interests that these forces have created."[48] Such was the disgust with the erosion of amateur ideals—with particular opprobrium reserved for the role of money in sport—that even the existence of professional coaches on college teams was singled out for criticism.[49]

Concerns about commercialism's impact have loomed over college sports since their inception[50] and were present at the birth of the NCAA in the early twentieth century.[51] In fact, despite the uproar over the rising number of deaths in early college football—twenty-six players were killed in the 1909 season alone[52]—it was the presence of money in sport that gave some critics and university personnel the greatest cause for alarm.[53] Charles Eliot, Harvard's

41. Porto, *supra* note 39, at 305–06.

42. *Compare* RONALD A. SMITH, SPORTS & FREEDOM: THE RISE OF BIG-TIME COLLEGE ATHLETICS 4 (1988), *with* Kenneth L. Shropshire, *Legislation for the Glory of Sport: Amateurism and Compensation*, 1 SETON HALL J. SPORTS L. 7, 12–13 (1991).

43. Shropshire, *supra* note 40, at 48.

44. *Id.*

45. Alex Moyer, Note, *Throwing Out the Playbook: Replacing the NCAA's Anticompetitive Amateurism Regime with the Olympic Model*, 83 GEO. WASH. L. REV. 761, 768 (2015).

46. Daniel E. Lazaroff, *The NCAA in Its Second Century: Defender of Amateurism or Antitrust Recidivist?*, 86 OR. L. REV. 329, 331 (2007).

47. Porto, *supra* note 39, at 306–07.

48. Smith, *supra* note 12, at 13.

49. *The Carnegie Foundation Report*, COLUM. DAILY SPECTATOR, Oct. 25, 1929, at 2.

50. *See* Carter, *supra* note 26, at 236.

51. *Id.* at 275–76.

52. *See Football in 1909 Caused 26 Deaths*, N.Y. TIMES, Nov. 21, 1909, at 9, https://timesmachine.nytimes.com/timesmachine/1909/11/21/106723238.html?pageNumber=9 [https://perma.cc/D6SW-QBUN].

53. Carter, *supra* note 26, at 217–18.

president from 1869 to 1909,[54] argued that "[d]eaths and injuries are not the strongest argument against football. . . . That cheating and brutality are *profitable* is the main evil."[55] Towards the end of Eliot's tenure, the athletic department income reported by Yale, Harvard's chief rival, amounted to $106,396—around $2.5 million in 2014 dollars.[56] Over the subsequent century, the growth in interest in college sports precipitated a staggering increase in the amount of money moving through the college-sports ecosystem,[57] relatively little of which ends up in the hands of the athletes themselves.[58]

Today, the hundreds of dollars spent to recruit crack rowers in a bid to defeat Yale have given way to billions of dollars' worth of value swirling about the college-sports ecosystem.[59] For example, as of 2019, the University of Texas at Austin's athletic department recorded $223,879,781 worth of revenue.[60] Coaches and administrators seem to be the greatest beneficiaries of this gold rush.[61] For his part, Steve Sarkisian, the current University of Texas head football coach, has a contract of $5.2 million per year starting in 2021, which is set to increase by $200,000 per year for six years and guarantees Coach Sarkisian at least $34.2 million over the life of the deal.[62] Administrators at the NCAA, despite it being a nonprofit, have cashed in as well: NCAA CEO Mark Emmert reportedly earned $3.9 million in salary as recently as 2017.[63]

Relatively little of this gold rush has found its way into the hands of arguably the central piece of the college sports landscape: the athletes themselves.[64] A study commissioned by the National Bureau of Economic Research estimated that in the case of football an equitable distribution of

54. *Eliot, Charles W. (1834-1926)*, HARV. SQUARE LIBR., https://www.harvardsquarelibrary.org/biographies/charles-w-eliot-harvard-university-president/ (last visited June 1, 2022) [https://perma.cc/JX48-5YM6].

55. Taylor Branch, *The Shame of College Sports*, ATL. (Oct. 2011), https://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/308643/ [https://perma.cc/Y8UK-AQTU] (emphasis added).

56. Conor Friedersdorf, *Money, Power, and College Sports in 1905 America*, ATLANTIC (Jan. 31, 2014), https://www.theatlantic.com/national/archive/2014/01/money-power-and-college-sports-in-1905-america/283495/ [https://perma.cc/ZJF3-9TLY].

57. Porto, *supra* note 39, at 310–11.

58. *See id.* at 311–12.

59. *Finances of Intercollegiate Athletics*, NCAA, https://www.ncaa.org/sports/2013/11/19/finances-of-intercollegiate-athletics.aspx (last visited June 1, 2022) [https://perma.cc/5B6Q-HCZP].

60. Steve Berkowitz, Matt Wynn & Camille McManus, *NCAA Finances 2018-2019*, USA TODAY, https://sports.usatoday.com/ncaa/finances/ (last visited June 1, 2022) [https://perma.cc/7AAR-YRCU].

61. Steve Berkowitz, Matt Wynn, Sean Dougherty & Emily Johnson, *NCAA Salaries*, USA TODAY, https://sports.usatoday.com/ncaa/salaries/ (last visited June 1, 2022) [https://perma.cc/NX5L-YAXY].

62. Anna Canizales, *$34 Million, Private Planes, Cars and Housing Allowances: Here's How Much UT-Austin Is Paying Football Coach Steve Sarkisian*, TEX. TRIB. (Feb. 22, 2021, 3:00 PM), https://www.texastribune.org/2021/02/22/steve-sarkisian-salary-ut-austin/ [https://perma.cc/H2F9-27E3].

63. Alaa Abdeldaiem, *Report: Mark Emmert Received 60% Raise in '17, Made $3.9M Amid College Hoops Scandal*, SPORTS ILLUSTRATED (May 24, 2019), https://www.si.com/college/2019/05/24/mark-emmert-raise-salary-college-hoops-scandal#:~:text=NCAA%20president%20Mark%20Emmert%20made,31%2C%202018 [https://perma.cc/V5LG-JQQS].

64. *See* Tom Huddleston Jr., *College Football Stars Could Be Earning as Much as $2.4 Million Per Year, Based on NCAA Revenues: Study*, CNBC (Sept. 2, 2020, 3:01 PM), https://www.cnbc.com/2020/09/02/how-much-college-athletes-could-be-earning-study.html [https://perma.cc/74ZJ-9TUK].

revenues from college athletic departments could yield earnings of up to $2.4 million for skilled positions.[65] These unrealized earnings have struck many commentators as deeply unfair,[66] yet they are a direct consequence of the NCAA's amateurism principle in practice, which stoutly rejects compensating players for on-field performance.[67]

B. Development of Antitrust Law in the United States

Although NCAA rules have been challenged under several legal theories, courts have primarily come to rely upon § 1 of the Sherman Antitrust Act of 1890 ("Sherman Act") to scrutinize NCAA rule-making.[68] The Sherman Act was enacted during an era in which numerous industries, such as oil and steel, had come to be controlled by small groups of dominant firms,[69] which resulted in a decline in competition and widespread use of abusive business practices.[70] The core goals of the Sherman Act were to restore competition by preventing monopolization through unfair means and cartel behavior[71] and—by so doing—improve the welfare of consumers.[72]

On its face, the Sherman Act declares illegal "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States."[73] The narrowest reading of this prohibition would perplexingly suggest that nearly all commercial contracts are in fact illegal restraints on trade.[74] In *Standard Oil Co. of New Jersey v. United States*, however, the Supreme Court came to understand this provision "to declare illegal any such contract which is [an] *unreasonable* restraint of trade"[75] and later reiterated that § 1 seeks to "outlaw *only* unreasonable restraints."[76]

Under § 1 of the Sherman Act, there are three principal paths that may lead to a finding that a practice is an unreasonable restraint of trade.[77] At one extreme, restraints may be found unreasonable per se because their purpose is so injurious

65. Craig Garthwaite, Jordan Keener, Matthew J. Notowidigdo & Nicole F. Ozminkowski, *Who Profits from Amateurism? Rent-Sharing in Modern College Sports* 30–32 (Nat'l Bureau of Econ. Rsch., Working Paper No. 27734, 2020).

66. *See, e.g.*, Fiona Harrigan, *Opinion: The Case for Paying College Athletes*, DETROIT NEWS (Aug. 30, 2020, 11:00 PM), https://www.detroitnews.com/story/opinion/2020/08/31/opinion-case-paying-college-athletes/5658183002/ [https://perma.cc/2WSR-CADD].

67. Shropshire, *supra* note 40, at 46–47.

68. *See* Thomas A. Baker III, Marc Edelman & Nicholas M. Watanabe, *Debunking the NCAA's Myth that Amateurism Conforms with Antitrust Law: A Legal and Statistical Analysis*, 85 TENN. L. REV. 661, 666–67 (2018).

69. H. W. BRANDS, AMERICAN COLOSSUS: THE TRIUMPH OF CAPITALISM, 1865–1900, 6–8 (2010).

70. *See* DANIEL YERGIN, THE PRIZE 80 (2008).

71. Nolan Ezra Clark, *Antitrust Comes Full Circle: The Return to the Cartelization Standard*, 38 VAND. L. REV. 1125, 1126 (1985).

72. Robert H. Bork, *The Role of the Courts in Applying Economics*, 54 ANTITRUST L.J. 21, 24 (1985).

73. 15 U.S.C. § 1.

74. Baker et al., *supra* note 68, at 665–66; Nat'l Soc'y of Pro. Eng'rs v. United States, 435 U.S. 679, 687–88 (1978).

75. 221 U.S. 1, 87 (1911) (emphasis in original).

76. State Oil Co. v. Khan, 522 U.S. 3, 10 (1997) (emphasis added).

77. Ohio v. Am. Express Co., 138 S. Ct. 2274, 2283 (2018).

to competition as to "threaten the proper operation of our predominantly free-market economy—that is, whether the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output."[78] The archetypal unreasonable restraint examined by the per se approach is "[h]orizontal price fixing . . . because the probability that these practices are anticompetitive is so high."[79] In recognition that some horizontal restrictions are necessary for the very existence of the league-sports industry, the Supreme Court has found the application of the per se approach inappropriate for reviewing NCAA rules.[80]

The analysis of NCAA rule-making under § 1 of the Sherman Act must therefore necessarily proceed by the other two routes: the "rule of reason"[81] or the "quick look."[82] The rule of reason, a product of the Supreme Court's decision in *Standard Oil Co.*,[83] seeks to "balance[] the procompetitive and anticompetitive effects of the restraint in a case-by-case" and fact-intensive evaluation.[84] The process for determining whether a restraint violates the rule of reason, and consequently § 1 of the Sherman Act, applies a "three-step, burden-shifting framework."[85] First, the plaintiff bears the burden of proving that "the challenged restraint has a substantial anticompetitive effect that harms consumers in the relevant market."[86] If the plaintiff carries this burden, the defendant can next offer a "procompetitive rationale for the restraint."[87] And finally, if the defendant succeeds in demonstrating the procompetitive effect of the restraint, the plaintiff bears the burden of both demonstrating that "the procompetitive efficiencies could be reasonably achieved through less anticompetitive means" and identifying a less restrictive alternative.[88]

The great disadvantage of a full rule-of-reason analysis is that it entails enormous expense,[89] primarily in what some have noted is the "uncertain and expensive" undertaking of defining the relevant market.[90] Thus, in situations where the anticompetitive effect of restraints "can easily be ascertained,"[91] courts have developed an intermediate standard to analyze restraints of trade: the "quick-look" or "abbreviated . . . analysis under the rule of reason."[92] Under the

78. Broad. Music Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 19–20 (1979).

79. NCAA v. Bd. Of Regents of Univ. of Okla., 468 U.S. 85, 100 (1984).

80. *Id.* at 100–01.

81. *Am. Express Co.*, 138 S. Ct. at 2284.

82. Cal. Dental Ass'n v. F.T.C., 526 U.S. 756, 759 (1999).

83. 221 U.S. 1, 66 (1911).

84. Kristin R. Muenzen, *Weakening Its Own Defense? The NCAA's Version of Amateurism*, 13 MARQ. SPORTS L. REV. 257, 264 (2003).

85. *Am. Express Co.*, 138 S. Ct. at 2284.

86. *Id.*

87. *Id.*

88. *Id.*

89. Jennifer E. Gladieux, Note, *Towards a Single Standard for Antitrust: The Federal Trade Commission's Evolving Rule of Reason*, 5 GEO. MASON L. REV. 471, 493 (1997).

90. Alan J. Meese, *Price Theory, Competition, and the Rule of Reason*, 2003 U. ILL. L. REV. 77, 106–07 (2003).

91. Cal. Dental Ass'n v. F.T.C., 526 U.S. 756, 770 (1999).

92. *Id.*

quick-look standard, defendants may offer evidence of procompetitive effect of the restraint, which would be impermissible under the per se approach.[93] But the court is entitled to "screen[] the evidence to determine whether proffered procompetitive effects are 'plausible.'"[94] If the restraint is plausibly procompetitive, then "the analysis expands toward the fuller rule of reason test."[95] If the justification is not plausible, "the practice can be condemned without fuller analysis."[96] Thus, depending on the obviousness of the facts presented, courts may apply more or less scrutiny while adhering to the core inquiry of "whether or not the challenged restraint enhances competition."[97]

C. Application of Antitrust Law to NCAA Rules

When applying the rule of reason to the NCAA, courts separate its regulations into two buckets: rules concerning the business of athletics on the one hand and rules promoting amateurism and governing athletes' eligibility on the other.[98] Within the first set of rules, numerous NCAA policies have come under scrutiny and—after the application of the rule of reason—found to violate § 1 of the Sherman Act.[99] These challenges have focused on a wide swath of business-side rules, including television rights;[100] athlete name, image, and likeness issues;[101] and, most recently, caps on scholarship aid.[102] In these diverse situations, courts have been united in their approach that a full burden-shifting inquiry under the rule of reason should be applied to determine the competitive effect of the restraint.[103]

The leading case in this area, which continues to guide U.S. courts' treatment of the NCAA in antitrust issues, is *NCAA v. Board of Regents of the University of Oklahoma*.[104] The facts in that case concerned a clear business policy, the NCAA's "television plan," which began to regulate the televising of college football games in 1951.[105] The 1951 plan decreed that "only one game a week could be telecast in each area."[106] Subsequent plans continued to restrict output for all college football programs and prevent NCAA member institutions

93. *Id.* at 775 n.12.

94. Kenneth G. Starling, *Increasing the FTC's Burden: Quick Look Versus the Full Rule of Reason*, 3 CORPS., SEC. & ANTITRUST PRAC. GRP. NEWSL. (Aug. 1, 1999), https://fedsoc.org/commentary/publications/increasing-the-ftc-s-burden-quick-look-versus-full-rule-of-reason [https://perma.cc/2LD9-8Z7M].

95. *Id.*

96. *Id.*

97. *Cal. Dental*, 526 U.S. at 780 (quoting NCAA v. Bd. Of Regents of Univ. of Okla. 468 U.S. 85, 104 (1984)).

98. John T. Wolohan, *What Is Reasonable: Are the NCAA's Restraints on Athlete Compensation Reasonable?*, 67 SYRACUSE L. REV. 515, 522 (2017).

99. *See, e.g.*, O'Bannon v. NCAA ("*O'Bannon II*"), 802 F.3d 1049, 1053 (9th Cir. 2015).

100. NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 88–89 (1984).

101. *O'Bannon II*, 802 F.3d at 1052.

102. *Alston I*, 958 F.3d 1239, 1247 (9th Cir. 2020).

103. *Bd. of Regents*, 468 U.S. at 103.

104. *Id.* at 88; Wolohan, *supra* note 98, at 524.

105. *Bd. of Regents*, 468 U.S. at 90.

106. *Id.*

from independently negotiating sales of television rights.[107] Every plan was justified by amateurism concerns and the goal of "reduc[ing], insofar as possible, the adverse effects of live television upon football game attendance."[108] In the early 1980s, a group of universities that had become dissatisfied with these television arrangements sued the NCAA, alleging antitrust violations.[109]

Writing for the Supreme Court, Justice John Paul Stevens set out using the rule of reason, recognizing first that the NCAA's television plan did restrain trade and was essentially "horizontal price fixing, perhaps the paradigm of an unreasonable restraint of trade."[110] Next, the Court found that because the product, college football, could not exist without some NCAA intervention to preserve the unique character of its product, "its actions widen[ed] consumer choice . . . and hence can be viewed as procompetitive."[111] It also held that even if the television plan could serve the NCAA's interests, such as amateurism and increasing competition within college football, the plan was not narrowly tailored to serve those goals.[112] Most damning of all, when ruling against the NCAA, Justice Stevens pointed out that "consumption will materially increase if the [caps on televised games] are removed," and therefore the television plan did not serve a "legitimate purpose."[113]

1. Presumptively Procompetitive Approach

Although the core holding of *Board of Regents* found that the NCAA's television plan—a commercial restraint—was unreasonable under the § 1 of the Sherman Act, courts have also relied on Justice Stevens's opinion to evaluate the other side of the NCAA's rule-making regime.[114] When reviewing noncommercial rules regulating the amateur character of college athletics, some courts have surmised that *Board of Regents* acknowledged that these rules were presumptively procompetitive and immune, perhaps even exempt, from the application of the Sherman Act and its rule-of-reason inquiry.[115] The reasoning underlying this position is found at several places in *Board of Regents*.[116] First, the Court noted that it refused to apply the per se approach under § 1 of the Sherman Act because "this case involve[d] an industry in which horizontal restraints on competition are essential if the product is to be available at all."[117] Second, Justice Stevens wrote that "[i]t is reasonable to assume that most of the regulatory controls of the NCAA are justifiable means of fostering competition . . . and therefore [are] procompetitive because they enhance public interest in

107. *Id.* at 91–92.
108. *Id.* at 91.
109. *Id.* at 95.
110. *Id.* at 100–01.
111. *Id.* at 102.
112. *Id.* at 119.
113. *Id.* at 120.
114. Baker et al., *supra* note 68, at 668–70.
115. *Id.* at 669–70.
116. *Id.*
117. *Bd. of Regents*, 468 U.S. at 101.

intercollegiate athletics."[118] In a final aside, the Court lionized the NCAA's mission, claiming that it "plays a critical role in the maintenance of a revered tradition of amateurism in college sports. There can be no question but that it needs ample latitude to play that role . . . ."[119]

Some commentators have argued that these brief discussions in *Board of Regents* are merely dicta.[120] Even so, numerous federal circuit courts have leaned heavily on these portions of the *Board of Regents* opinion as a guide for examining some of the rules promulgated by the NCAA.[121] This group of rules, which can be broadly described as "amateurism rules," have been upheld as reasonable restrictions by many courts,[122] and on the whole have been spared from the demanding factual inquiry of a full rule-of-reason analysis based on the conclusion that amateurism rules are presumptively procompetitive.[123]

In what has been likened to a "bad game of telephone," these decisions by federal circuit courts have developed the "procompetitive presumption" for NCAA amateurism rules.[124] This line of cases prominently began with the Fifth Circuit's ruling in *McCormack v. NCAA*, which dealt with a challenge to the NCAA's suspension of Southern Methodist University's football program for the 1987 season after the school violated NCAA restrictions on athlete compensation.[125] There, the Fifth Circuit held that because amateurism and eligibility rules create the college football product, the enforcement of those rules by a suspension did not violate antitrust law.[126] Later, in *Smith v. NCAA*, the Third Circuit took up a lawsuit over the athletic eligibility of athletes after the student-athlete transferred to a graduate program at a university different from the athlete's undergraduate institution.[127] The *Smith* court reasoned that because the rules concerned eligibility issues and not business activities, the Sherman Act was inapplicable to the challenged regulations.[128] And the Seventh Circuit in *Banks v. NCAA* examined the NCAA's prohibition on the participation of student-athletes who choose to enter a professional draft or hire an agent for the purposes of seeking employment with a professional organization.[129] There, the court found that the no-agent rule was an eligibility bylaw and held that the plaintiff failed to state an anticompetitive effect.[130] In each of these cases, courts have extrapolated out of *Board of Regents*' musings about amateurism, and the

118. *Id.* at 117.
119. *Id.* at 120.
120. *See* Baker et al., *supra* note 68, at 669; Muenzen, *supra* note 84, at 275.
121. Baker et al., *supra* note 68, at 670.
122. *See* Smith v. NCAA, 139 F.3d 180, 187 (3d Cir. 1998); McCormack v. NCAA, 845 F.2d 1338, 1340 (5th Cir. 1988); Banks v. NCAA, 977 F.2d 1081, 1091 (7th Cir. 1992).
123. Baker et al., *supra* note 68, at 668.
124. *Id.* at 670.
125. 845 F.2d at 1340.
126. *Id.* at 1344–45.
127. 139 F.3d at 182.
128. *Id.* at 185–86.
129. 977 F.2d 1081, 1082 (7th Cir. 1992).
130. *Id.* at 1091, 1094.

NCAA's role in promoting it, a presumption that "the NCAA's amateurism rules, as a matter of law, conform with antitrust scrutiny."[131]

Above all, the Seventh Circuit has been boldest in applying the doctrine of presumptive procompetitiveness to eligibility rules. In 2012, its decision in *Agnew v. NCAA* took up a § 1 challenge to NCAA rules that capped the number of scholarships allowed per team and banned multiyear scholarships.[132] In affirming the district court's dismissal of the case, the Seventh Circuit boiled the entire enterprise down to a single question: "whether the NCAA regulations at issue are of the type that have been blessed by the Supreme Court, making them presumptively procompetitive."[133] Thus, it would seem that if a court can plausibly find that a given rule falls within the eligibility rule or "amateurism" bucket, the presumption of procompetitiveness will virtually always end the inquiry then and there.

Most recently, the Seventh Circuit applied the presumption of procompetitiveness in *Deppe v. NCAA* to uphold the dismissal of an antitrust challenge to the NCAA's "year-in-residence" rule.[134] This rule mandates that student-athletes transferring to Division I schools, which sponsor the most competitive tier of college athletics, sit out one full academic year before competing for their new institution.[135] In reviewing the trial court's dismissal of the case on the pleadings, the Seventh Circuit began by reiterating what the Supreme Court discussed in *Board of Regents*: namely, the assertion that most NCAA rules will be both reasonable and procompetitive because the rules promote competition—particularly when regulating game rules, athlete eligibility, and coordination between NCAA member institutions to support the continuation of intercollegiate athletics.[136] Citing the earlier *Agnew* decision, the court asserted that *Board of Regents* thus confers "a license to find certain NCAA bylaws that 'fit into the same mold' as those discussed in *Board of Regents* to be procompetitive."[137]

The ultimate result of this reasoning is a legal standard holding that NCAA rules that are found to be procompetitive do not need to proceed to a full rule-of-reason inquiry, and such a lawsuit may be resolved at the motion-to-dismiss phase of litigation, invariably in favor of the NCAA.[138] Consequently, as announced in *Agnew*, "the first—and possibly only—question . . . is whether the NCAA regulations at issue are of the type that have been blessed by the Supreme Court, making them presumptively procompetitive."[139] The extent of this protection is determined by weighing whether the challenged rule is "meant to

131. Baker et al., *supra* note 68, at 670.
132. 683 F.3d 328, 332 (7th Cir. 2012).
133. *Id.* at 341.
134. 893 F.3d 498, 499, 503–04 (7th Cir. 2018).
135. *Id.* at 499.
136. *Id.* at 501 (quoting NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 117 (1984)).
137. *Id.* (quoting *Bd. of Regents*, 468 U.S. at 117).
138. *Id.*
139. *Id.* (quoting Agnew v. NCAA, 683 F.3d 328, 341 (7th Cir. 2012)).

help maintain 'the revered tradition of amateurism in college sports.'"[140] Furthermore, there is no question about which rules qualify for this extraordinary protection: if the rules are included among the NCAA's eligibility rules, "[m]ost—if not all" of them would become exempt from meaningful antitrust scrutiny under this approach.[141]

With this reasoning in place, the Seventh Circuit's ultimate decision in *Deppe* was straightforward—for when the court found that the year-in-residence rule was "clearly meant to help maintain the 'revered tradition of amateurism in college sports,'" that rule was placed directly into the eligibility-rule bucket.[142] The court even explicitly relied on the fact that the year-in-residence rule was located in the "eligibility" section of the NCAA Division I manual.[143] The rule was upheld because it was "on its face, a presumptively procompetitive eligibility rule . . . . [and] [a]ccordingly, a full rule-of-reason analysis [was] unnecessary," and no investigation of the rule's anticompetitive effect was undertaken.[144]

2. Rule-of-Reason Approach

An alternative line of cases has also grown from *Board of Regents*.[145] The Ninth Circuit, in *O'Bannon v. NCAA* ("*O'Bannon II*"), notably subjected some long-standing name, image, and likeness ("NIL") rules to a rule-of-reason fact investigation to determine whether they had a procompetitive effect.[146] In *O'Bannon II*, a former UCLA men's basketball player sued the NCAA and alleged that its restrictions on NIL compensation for college athletes violated the Sherman Act.[147] The NCAA predictably defended its prohibition on NIL compensation by arguing that the restriction was a regulation designed to protect amateurism and thus should be exempted from antitrust scrutiny under the reading of *Board of Regents* espoused by *Agnew* and others.[148] Not only did the Ninth Circuit reject the NCAA's presumption of procompetitiveness argument in *O'Bannon II*, but it also went on to reject the secondary contention that eligibility rules are exempt because they do not regulate commercial activities stating that "the modern legal understanding of commerce is broad, including almost every activity from which the actor anticipates economic gain."[149] Ultimately, the circuit court affirmed the decision of the lower court, which had subjected the NCAA's rule to the full rule-of-reason analysis.[150] Despite the circuit court's reiterations of the narrowness of its decision, this decision

140. *Id.* (quoting *Agnew*, 683 F.3d at 342–43 (internal quotations omitted)).
141. *Id*. at 502 (alteration in original) (quoting *Agnew*, 683 F.3d at 343).
142. *Id.* at 503 (quoting *Agnew*, 683 F.3d at 342).
143. *Id.* at 502; NAT'L COLLEGIATE ATHLETIC ASS'N, *supra* note 1, at § 14.5.1.
144. *Deppe*, 893 F.3d at 503–04.
145. Baker et al., *supra* note 68, at 674.
146. *Id.*
147. NCAA v. O'Bannon (*O'Bannon II*), 802 F.3d 1049, 1055 (9th Cir. 2015).
148. *Id.* at 1061.
149. *Id.* at 1065 (internal quotations omitted).
150. *Id.* at 1079.

invigorated the stance that NCAA rules may be upheld as procompetitive—but that the potential of such an outcome should not allow the NCAA to skirt scrutiny under the Sherman Act at the outset.[151]

Following *O'Bannon II*, the Ninth Circuit took up another challenge to NCAA rules in *Alston I*, which concerned "grant-in-aid"—the scholarship packages offered to student-athletes by NCAA member institutions.[152] NCAA bylaws allowed its "Power Five" member institutions, the largest and most competitive schools in the Division I football subdivision, to adopt their own limits on grant-in-aid.[153] In 2015, these schools voted to set the limit for grant-in-aid at the cost of attendance ("COA").[154] The bylaws also included an "Amateurism Rule," which stripped athletes of eligibility to compete if they received pay for their skills beyond that provided by NCAA legislation.[155] But, many types of payments for athletic participation unrelated to education were allowed without a loss of athlete eligibility.[156] The plaintiffs alleged that the NCAA and its member institutions had violated the Sherman Act by wielding "monopsony power to artificially cap compensation" in a way that did not reflect the true value of the services provided by athletes.[157]

The district court subjected the challenged restraints to a full rule-of-reason analysis, finding at the outset that the plaintiffs carried their burden of showing the restraints' anticompetitive effect.[158] In response, the NCAA proffered its traditional argument: that the grant-in-aid cap was in fact procompetitive because it served "amateurism."[159] Finding this justification unconvincing, the district court noted that the rules in question "do not follow any coherent definition of amateurism" and further noted that payments "have not diminished demand for college sports."[160] It then went on to arrive at a viable less-restrictive alternative arrangement for regulating grant-in-aid.[161]

In the Ninth Circuit's review of the lower court's verdict for the plaintiff student-athletes, Judge Sidney Thomas took aim at the NCAA's contention that the district court was "straying from a purported 'judicial consensus' that the NCAA expands consumer choice by enforcing an amateurism principle under

151. *Id.*

152. 958 F.3d 1239, 1244 (9th Cir. 2020); *see also* Michael McCann, *Why the NCAA Lost Its Latest Landmark Case in the Battle Over What Schools Can Offer Athletes*, SPORTS ILLUSTRATED (Mar. 8, 2019), https://
www.si.com/college/2019/03/09/ncaa-antitrust-lawsuit-claudia-wilken-alston-jenkins [https://perma.cc/6GAH-5DKA] (exploring the various benefits schools may provide athletes following the *Alston* district court decision).

153. *Alston I*, 958 F.3d at 1244.

154. *Id.*

155. *Id.*

156. Additional non-COA compensation included categories of payments such as "athletic participation awards," payouts from the NCAA Student Assistance Fund for various purposes, and per diems for incidental expenses related to travelling or practices. *Id.* at 1244–45.

157. *Id.* at 1248.

158. *Id.*

159. *Id.* at 1249.

160. *Id.* (quoting *In re* NCAA Grant-in-Aid Cap Antitrust Litig., 375 F. Supp. 3d 1058 (N.D. Cal. 2019), *aff'd*, 958 F.3d 1239 (9th Cir. 2020), *aff'd sub nom.* NCAA v. Alston, 141 S. Ct. 2141 (2021)).

161. *Id.* at 1251.

which student-athletes 'must not be paid' a penny over the COA."[162] While acknowledging that *Board of Regents* did "define amateurism to exclude payment for athletic performance,"[163] Judge Thomas seconded *O'Bannon II*'s assessment that *Board of Regents*' amateurism discussion was "dicta."[164] Thus, the district court's deployment of the rule-of-reason analysis was proper, and succinctly put, the "NCAA limits on education-related benefits 'do not play by the Sherman Act's rules.'"[165]

The *Alston I* litigation in the Ninth Circuit meaningfully shifted the college sports landscape by allowing schools to more freely compete for athletes on price with their scholarship packages and opened the possibility that new classes of education-related benefits may be extended to student-athletes.[166] Furthermore, *Alston I* broke with previous applications of antitrust law to NCAA rules when the court found an antitrust violation in limits on education-related scholarships, a central aspect of the NCAA's regulation of amateurism.[167]

The Supreme Court confirmed this shift in its opinion in *Alston II*, which clarified *Board of Regents*'s applicability to educational-benefit limits and essentially adopted the Ninth Circuit's reasoning.[168] Despite the NCAA's pleas to review its grant-in-aid caps under a favorable quick-look analysis,[169] Justice Gorsuch, writing for the majority, crystallized the notion that while "*some* restraints are necessary to create or maintain a league sport does not mean *all* 'aspects of elaborate interleague cooperation are.'"[170] Accordingly, though "quick look will often be enough to approve the restraints 'necessary to produce the game,' a fuller review may be appropriate for others."[171]

Moreover, the Supreme Court held that *Board of Regents* does not present an insurmountable obstacle to applying the rule of reason to rules like grant-in-aid caps.[172] The Court recognized that "*Board of Regents* may suggest that courts should take care when assessing the NCAA's restraints on student-athlete compensation," but it squarely rejected the contention that "courts must reflexively reject *all* challenges to the NCAA's compensation restrictions."[173] As Justice Gorsuch explained, this conclusion is sensible because the outcome of antitrust cases "necessarily depends on a careful analysis of market realities."[174] Thus, given that "market realities have changed significantly since

162. *Id.* at 1258.

163. *Id.*

164. *Id.* (quoting NCAA v. O'Bannon (*O'Bannon II*), 802 F.3d 1049, 1063 (9th Cir. 2015).

165. *Id.* at 1265.

166. Hannah Albarazi, *NCAA Can't Halt Ruling Uncapping Athlete Education Benefits*, LAW360 (Aug. 4, 2020, 10:30 PM), https://www.law360.com/articles/1298487/ncaa-can-t-halt-ruling-uncapping-athlete-education-benefits [https://perma.cc/8DKJ-WZ97].

167. *Id.*

168. *Alston II*, 141 S. Ct. 2141, 2164, 2166 (2021).

169. *Id.* at 2155.

170. *Id.* at 2156 (emphasis in original) (quoting Am. Needle, Inc. v. Nat'l Football League, 560 U.S. 183, 199 n.7 (2010)).

171. *Id.* at 2157 (quoting *Am. Needle*, 560 U.S. at 199 n.7).

172. *Id.*

173. *Id.* at 2158 (emphasis in original).

174. *Id.*

1984" when *Board of Regents* was decided, it would be "particularly unwise to treat an aside" regarding deference to NCAA rules as more than that: an aside.[175]

Alston II, much like *Alston I*, confined itself to the narrow questions of whether the NCAA's caps on grant-in-aid violated antitrust principles[176] and whether the Ninth Circuit's use of the rule of reason was the appropriate framework to review the NCAA's rule.[177] A concurring opinion filed by Justice Kavanaugh in *Alston II*, however, sketched out a more aggressive approach to scrutinizing NCAA rules.[178] In particular, Justice Kavanaugh doubled down on the proposition that "decades-old 'stray comments' about college sports and amateurism made in [*Board of Regents*], were dicta and have no bearing on whether the NCAA's current compensation rules are lawful."[179] He also raised questions about the NCAA's justifications, principally its efforts to "couch[] its arguments for not paying student athletes in innocuous labels."[180] The concurrence ultimately confined itself to the realm of compensation but returned to the kernel pursued throughout the *Alston* litigation: "[t]he NCAA is not above the law."[181]

It is worth noting that the imposition of changes to grant-in-aid policies at NCAA schools following *Alston I* and *II* have emerged at a time of broadening support for better compensating student-athletes, above all in terms of NIL compensation.[182] Diverse authorities, including Florida,[183] California,[184] Congress,[185] and even the NCAA itself[186] are beginning to explore ways in which NIL benefits should be altered, while all stakeholders in the American college-sports marketplace continue to adjust to new challenges and changing

175. *Id.*

176. *Id.* at 2166 (Kavanaugh, J., concurring).

177. *Id.* at 2163 (majority opinion).

178. *Id.* at 2166 (Kavanaugh, J., concurring).

179. *Id.* at 2167.

180. *Id.*

181. *Id.* at 2169.

182. Andrea P. Brockway, Tricia Kazinetz & Amy L. Piccola, *NIL Update: NCAA Delays NIL Rule While Congress and States Continue with Divergent Goals and the U.S. Supreme Court Buzzes In*, JD SUPRA (Feb. 9, 2021), https://www.jdsupra.com/legalnews/nil-update-the-ncaa-delays-nil-rule-7121989/ [https://perma.cc/QD2J-BJUK].

183. FLA. STAT. § 1006.74 (2021) ("Intercollegiate Athlete Compensation and Rights"); Dan Murphy, *Florida Name, Image, Likeness Bill Now a Law; State Athletes Can Profit from Endorsements Next Summer*, ESPN (June 12, 2020), https://www.espn.com/college-sports/story/_/id/29302748/florida-name-image-likeness-bill-now-law-meaning-state-athletes-profit-endorsements-next-summer [https://perma.cc/3U4S-8VSK].

184. CAL. EDUC. CODE § 67456 (West 2021); Steve Berkowitz, *California Governor Signs Bill That Makes It Easier for College Athletes to Profit from Name, Likeness*, USA TODAY (Sept. 30, 2019, 5:13 PM), https://www.usatoday.com/story/sports/college/2019/09/30/college-sports-california-governor-signs-image-and-likeness-bill/2367426001/ [https://perma.cc/KLK3-836H].

185. *See, e.g.*, College Athlete Compensation Rights Act, S.5003, 116th Cong. (2020); Ross Dellenger, *In Significant Step Around NCAA Athlete Rights, New Name, Image and Likeness Bill to Be Introduced in Congress*, SPORTS ILLUSTRATED (Dec. 10, 2020), https://www.si.com/college/2020/12/10/ncaa-name-image-likeness-bill-congress [https://perma.cc/4WSW-8TA5].

186. *Board of Governors Moves Toward Allowing Student-Athlete Compensation for Endorsements and Promotions*, NCAA (Apr. 29, 2020, 8:30 AM), https://www.ncaa.org/about/resources/media-center/news/board-governors-moves-toward-allowing-student-athlete-compensation-endorsements-and-promotions [https://perma.cc/7MPC-3SND].

values in the country and the college sports industry. Thus, even beyond the *Alston* cases, public interest in reforming both the modern definition of amateurism and the relationship between student-athletes and the institutions that run the college sports world continues to grow.

III. ANALYSIS

A. The approach to amateurism rules embodied in Deppe overstates the finding of Board of Regents and strays from sound policy goals[187]

In *Deppe*, as discussed above, the Seventh Circuit held that *Board of Regents* entitled eligibility rules to a "procompetitive presumption . . . because they define what it means to be a student-athlete and thus preserve the tradition and amateur character of college athletics."[188] Thus, the court declined to pursue any deeper analysis of the restraint and by no means entertained embarking on the three-step rule-of-reason burden-shifting analysis of the NCAA's "year-in-residence" rule and other rules like it.[189] From both legal and policy perspectives, it is dubious that the *Deppe* approach correctly applies the reasoning of *Board of Regents,* or even consistently serves the ideals of amateurism that the NCAA and *Board of Regents* purport to uphold.

First, in light of *Alston II*, *Deppe* and other decisions go too far in their proposition that *Board of Regents* permits the NCAA's eligibility rules to be shielded from a full Sherman Act rule-of-reason analysis as presumptively procompetitive regulations.[190] While *Board of Regents* concerned the NCAA's 1981 television plan for the 1982 to 1985 seasons,[191] it also offered a broader perspective on how courts should scrutinize NCAA rules. The Court put a particular focus on the rule of reason, as NCAA cases "involve[] an industry in which horizontal restraints on competition are essential if the product is to be available at all."[192] As such, the Court recognized that there are rules that the NCAA must be able to make in order for college sports to exist in the first place, including "the size of the field, the number of players on a team, and the extent to which physical violence is to be encouraged or proscribed."[193]

Following this discussion, *Board of Regents* closes with its oft-cited ode to the "revered tradition of amateurism in college sports."[194] Though *Deppe* and other decisions imbue this line with supreme authority, it has been deemphasized as dicta by both courts and commentators.[195] But more importantly, this nod to

187. *See* discussion *infra* Section III.A.

188. *See* discussion *infra* Subsection II.C.1; Deppe v. NCAA, 893 F.3d 498, 502 (7th Cir. 2018).

189. *Deppe*, 893 F.3d at 503–04; *see also* McCormack v. NCAA, 845 F.2d 1338, 1345 (5th Cir. 1988).

190. *See* NCAA v. O'Bannon (*O'Bannon II*), 802 F.3d 1049, 1064 (9th Cir. 2015) ("The NCAA cites decisions of three of our sister circuits . . . . Only one . . . *Agnew v. NCAA* . . . comes close to agreeing with the NCAA's interpretation of *Board of Regents*, and we find it unpersuasive.").

191. NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 91 (1984).

192. *Id.* at 101.

193. *Id.*

194. *Id.* at 120.

195. *Alston I*, 958 F.3d 1239, 1246 (9th Cir. 2020); Crabb, *supra* note 34, at 194.

the NCAA's role in promoting amateurism must still be read in light of the core holding of the case: that "consistent with the Sherman Act, the role of the NCAA must be to preserve a tradition that might otherwise die; rules that restrict output are hardly consistent with this role."[196] Thus, *Board of Regents* appears to require that challenged NCAA rules be subjected to some level of antitrust scrutiny.[197] But Justice Stevens's opinion is also very clear that the extensive market definition inherent to the full rule of reason may not always be required when examining NCAA regulations—obvious cases of anticompetitive or procompetitive rules may be decided "in the twinkling of an eye" under an abbreviated quick-look review.[198] To provide an additional presumption of procompetitiveness in the case of amateurism or eligibility rules needlessly undermines this already flexible standard.

Therefore, far from orienting the Court in favor of a per se presumptiveness rule for NCAA eligibility regulations, *Board of Regents* endorses the common-sense rationale that the continued existence of college athletics must allow for some restrictive behavior.[199] At the same time, however, the Court went on to insist that those restrictive behaviors must be subject to antitrust review to ensure that the NCAA does not act in a way that unreasonably restrains trade beyond those rules necessary to maintain the existence of amateur athletics as part of the overall sports marketplace.[200]

Accordingly, when the *Deppe* court flatly declined to apply even an abbreviated rule-of-reason analysis,[201] its apparent belief that *Board of Regents* intended to exempt eligibility rules from scrutiny ran afoul of the second part of *Board of Regents*'s closing words: "rules that restrict output are hardly consistent with [the NCAA's] role."[202] It is quite plausible to construe the year-in-residence rule at issue in *Deppe* as an output restriction. Absent an exemption, the rule prevented athletes who transferred teams from competing for a full year before they could play again.[203] One could argue, as the plaintiffs did in *Deppe*, that the year-in-residence rule deters quality players recruited to the most competitive institutions from seeking a better deal from another school,[204] and it thus has the effect of reducing the supply of college-level players available to institutions that wish to recruit transfers. In *Board of Regents*, Justice Stevens examined "the totality of the circumstances" to conclude that the television plan's "anticompetitive limitation on price and output was not offset by any

196. *Bd. of Regents*, 468 U.S. at 120.

197. *Id.*

198. *Id.* at 109 n.39.

199. *Id.*

200. *Id.* at 119–20 ("The hypothesis that legitimates the maintenance of competitive balance as a procompetitive justification . . . is that equal competition will maximize consumer demand for the product. The finding that consumption will materially increase if the controls are removed is a compelling demonstration that they do not in fact serve any such legitimate purpose.").

201. Deppe v. NCAA, 893 F.3d 498, 503–04 (7th Cir. 2018).

202. *Bd. of Regents*, 468 U.S. at 120.

203. *Deppe*, 893 F.3d at 500.

204. *Id.* at 503.

procompetitive justification sufficient to save the plan."[205] *Deppe*'s refusal to even weigh the anticompetitive output consequences of the year-in-residence rule is therefore plainly out of step with the Supreme Court's guidance in 1984 and 2021.[206]

Moreover, the Seventh Circuit's reasoning in *Deppe* is unconvincing because the policy of separating "commercial" and "eligibility" rules into discrete camps and applying different standards to each is a futile exercise—one that drags federal courts into an entirely avoidable factual quagmire.[207]

Part of the trouble in sorting out which purpose a rule serves certainly relates back to the lofty, yet hazy, ideal at the center of college sports: amateurism. The NCAA bylaws state that "student-athletes shall be amateurs in an intercollegiate sport, and their participation should be motivated primarily by education and by the physical, mental and social benefits to be derived."[208] The bylaws go on to insist that "intercollegiate athletics is an avocation" and that "student-athletes should be protected from exploitation by professional and commercial enterprises."[209]

There is no doubt that this definition of amateurism is steeped in the concerns that surrounded college sports when the NCAA was founded, with its paeans to the virtue of pure competition and a paternalistic urge to safeguard athletes from the corrupting influence of money.[210] But even with more than a century between the NCAA's founding and today, it is still unclear where the thrust of its definition of "amateurism" as a concept truly lies. Is it the focus on the "student" part of student-athlete, with sport serving as an adjunct to education? The well-documented struggles of student-athletes in the classroom suggest otherwise.[211] Is the freedom from commercial interference the core of amateurism? Commercial interference has long been part of college sports,[212] and forthcoming legislative efforts to fully allow athletes to take advantage of NIL licensing opportunities may take this aspect of amateurism off the table altogether.[213] Or is the thrust of the NCAA's amateurism definition that amateurs

205. *Bd of Regents*, 458 U.S. at 97–98.

206. *See* discussion *supra* Section III.A.

207. *Deppe*, 893 F.3d at 502.

208. NAT'L COLLEGIATE ATHLETIC ASS'N, *supra* note 1, at § 2.9.

209. *Id.* Avocation is defined by Meriam-Webster as "a subordinate occupation pursued in addition to one's vocation" or a "hobby." *Avocation*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/avocation (last visited June 1, 2022) [https://perma.cc/HB99-4ZAH].

210. *See* discussion *supra* at Section II.A.

211. Uma M. Jayakumar & Eddie Comeaux, *The Cultural Cover-Up of College Athletics: How Organizational Culture Perpetuates an Unrealistic and Idealized Balancing Act*, 87 J. HIGHER ED. 488, 503 (2016); *see* David Frank, *Do Division I Athletes Get the Academics They Deserve?*, NCSA, https://www.ncsasports.org/blog/2016/05/25/division-college-sports-fail-studentathletes/ (last visited Mar. 7, 2021) [https://perma.cc/P9B7-DNNC]; Daniel Oppenheimer, *Why Student Athletes Continue to Fail*, ZOCALO PUB. SQUARE (April 28, 2015), https://www.zocalopublicsquare.org/2015/04/28/why-student-athletes-continue-to-fail/ideas/nexus/ [https://perma.cc/QJ5K-2UTR].

212. Porto, *supra* note 39, at 306.

213. *See, e.g.*, Ralph D. Russo, *Latest Bill Would Bar NCAA Limits on NIL*, AP NEWS (Feb. 4, 2021), https://apnews.com/article/bills-legislation-chris-murphy-laws-b6e1507efa35e724373ce8f613df4c97 [https://perma.cc/B5AJ-E5B7].

cannot engage in the same methods employed at the professional level of sports? But more and more college teams continue to adopt practices that are commonplace at the professional level.[214]

College sports have changed markedly since their inception and since the founding of the NCAA.[215] Justifiably, one would assume that the definition of amateurism would have shifted and crystallized over this period as well. But in large part it has not, and this directly contributes to the difficulty of assessing what is, in fact, an amateurism or eligibility rule for the purposes of antitrust scrutiny. Other commentators have likewise noted that the uncertain definition of amateurism is problematic, with some advocating improving the current definition by expanding it to formally recognize the commercial successes of the industry,[216] or alternatively, by substituting the present approach with the Olympic model.[217] But until the NCAA can arrive at a more stable definition of the very concept that underpins much of its entire enterprise, it makes little sense to yoke the level of antitrust scrutiny that a rule receives to the NCAA's own assumptions about whether rules promote amateurism or merely govern eligibility.

Furthermore, the NCAA itself is often to blame for the difficulty of parsing commercial, compensation, and amateurism rules—largely because it has not "define[d] amateurism in a consistent way and [has] often allowed student-athletes to receive compensation for athletic performance."[218] The propriety of this compensation is, in theory, highly questionable in the face of the clear prerequisites for eligibility set out in the NCAA's own rules.[219] Beyond this contradiction, the NCAA has often insisted that its amateur product does not intersect with commercialism,[220] when in fact its product is deeply intertwined with commercial concerns.[221]

In an illustration from the *Alston I* case, the NCAA imposed an "Amateurism Rule" barring athletes from competition if they used their skills for pay, while it simultaneously passed legislation that approved payments to athletes beyond the COA at their universities.[222] The additional compensation

214. More relaxed rules have allowed NCAA football programs to adopt professional-style training and coaching techniques, including more off-season contact with players that strongly resembles NFL "OTAs," or organized team activities. *See* Ben Kercheval, *Biggest Similarities and Differences Between CFB and NFL Training Camps*, BLEACHER REP. (Aug. 5, 2015), https://bleacherreport.com/articles/2540075-biggest-similarities-and-differences-between-cfb-and-nfl-training-camps [https://perma.cc/MU8H-MP66].

215. Gerald Gurney, Donna A. Lopiano & Andrew Zimbalist, *How College Sports Lost Its Way I*, *in* UNWINDING MADNESS: WHAT WENT WRONG WITH COLLEGE SPORTS AND HOW TO FIX IT 3, 4, 16 (2017).

216. Porto, *supra* note 39, at 328–29.

217. Moyer, *supra* note 45, at 825–26.

218. Crabb, *supra* note 34, at 197; *Alston II*, 141 S. Ct. 2141, 2152 (2021).

219. *See* NAT'L COLLEGIATE ATHLETIC ASS'N, *supra* note 1, at § 12.01.1 ("Only an amateur student-athlete is eligible for intercollegiate athletics participation in a particular sport."); *see also id.* at § 12.1.2 ("An individual loses amateur status and thus shall not be eligible for intercollegiate competition in a particular sport if the individual . . . (a) uses athletics skill (directly or indirectly) for pay in any form in that sport . . . .").

220. Amy Christian McCormick & Robert A. McCormick, *The Emperor's New Clothes: Lifting the NCAA's Veil of Amateurism*, 45 SAN DIEGO L. REV. 495, 501 (2008).

221. Cody J. McDavis, Comment, *The Value of Amateurism*, 29 MARQ. SPORTS L. REV. 275, 277 (2018).

222. *Alston I*, 958 F.3d 1239, 1244 (9th Cir. 2020).

did not even need to relate to education, and it was variously composed of "several hundred dollars for athletic performance," payments of "sometimes thousands of dollars" from the NCAA Student Assistance Fund, and "personal or family expenses."[223] The expansion of benefits for student-athletes may be justifiable, or even laudable, considering the rising public support for better compensating these athletes.[224] But the NCAA's policies—decrying pay-for-play on the one hand while blessing noneducational benefits over the COA on the other—remain internally inconsistent.

The NCAA also continues to muddy the rationale behind its rules by moving the yardsticks for what constitutes an amateurism or eligibility rule in other ways: for instance, its recent development of the transfer portal.[225] The portal was designed to streamline the formerly byzantine athlete transfer process,[226] but the transfer portal was accompanied with numerous waivers that undermined the very year-in-residence rule found to be beyond reproach in *Deppe*.[227] This combination prompted Coach Nick Saban of the University of Alabama to claim that the NCAA has effectively moved towards adopting free agency,[228] a hallmark of many professional sports leagues.[229] Given that the year-in-residence rule was upheld by the Seventh Circuit as a tool to maintain the amateur character of college sports,[230] its effective undoing with the creation of the transfer portal raises serious questions about whether it makes sense to continue distinguishing amateurism eligibility rules from other kinds of NCAA rules—particularly because the NCAA itself does not seem committed to keeping the very rules that courts have blessed for maintaining the amateur character of college athletics.[231]

223. *Id.* at 1244–45.

224. Michael T. Nietzel, *Americans Now Overwhelmingly Support College Athletes Earning Endorsement and Sponsorship Money*, FORBES (Feb. 11, 2020, 8:43 AM), https://www.forbes.com/sites/michaeltnietzel/2020/02/11/americans-now-overwhelmingly-support-college-athletes-earning-endorsement-and-sponsorship-money/?sh=25a35b66648e [https://perma.cc/PXU5-ZFYH].

225. Greg Johnson, *What the NCAA Transfer Portal Is . . . and What It Isn't*, NCAA CHAMPION MAG., (Fall 2019) http://s3.amazonaws.com/static.ncaa.org/static/champion/what-the-ncaa-transfer-portal-is/index.html [https://perma.cc/SL8N-8M9E].

226. *Id.*

227. Emily Caron, *Nick Saban: NCAA Turning Into 'Free Agency' with Increase in Transfer Waiver Approvals*, SPORTS ILLUSTRATED (July 17, 2019), https://www.si.com/college/2019/07/17/nick-saban-transfer-portal-eligibility-waivers-free-agency-comments [https://perma.cc/4JV4-HMBQ].

228. *Id.*

229. *Free Agency Explained*, NBA, https://www.nba.com/free-agency-explained (last visited May 25, 2022) [https://perma.cc/PJ5R-KRPQ]; *Free Agency*, MLB, http://m.mlb.com/glossary/transactions/free-agency (last visited May 25, 2022) [https://perma.cc/57XG-YD2Q]; *2020 NFL Free Agency Questions and Answers*, NFL (Mar. 17, 2020), https://operations.nfl.com/updates/football-ops/2020-nfl-free-agency-questions-answers/ [https://perma.cc/G8GT-3KTT].

230. Deppe v. NCAA, 893 F.3d 498, 503–04 (7th Cir. 2018).

231. In a further sign that the NCAA is willing to accommodate a version of free agency, in April 2021, the NCAA adopted a "one-time transfer rule," which will apply to athletes in all sports. This rule will allow athletes transferring for the first time to compete immediately. NAT'L COLLEGIATE ATHLETIC ASS'N, 2021–22 NCAA DIVISION I MANUAL § 14.5.5.2.10 (2021), https://web3.ncaa.org/lsdbi/reports/getReport/90008 [https://perma.cc/62NE-P4J2]. The waiver process described above still applies for athletes who transfer more than once. David Cobb, *NCAA Board of Directors Ratifies One-Time Transfer Legislation Allowing Athletes Immediate Eligibility*,

The distinction between commercial rules and amateurism or eligibility rules is also questionable based on the arguments that the NCAA raised in its recent history of antitrust litigation.[232] In *O'Bannon II*, the NCAA argued that its limits on NIL compensation were in fact amateurism rules and thus should be shielded from scrutiny.[233] Likewise in *Alston I*, the NCAA argued that its limits on grant-in-aid were "safeguards" for amateurism.[234] If the NCAA's views were correct, then each of these restrictions would have had such an obvious procompetitive effect that deeper analysis of their impacts would be unwarranted. Yet when the district courts examined the evidence, they both concluded that these restraints had anticompetitive effects and that the imposition of less restrictive alternatives was necessary.[235] While the *Deppe* decision appears to see some role for courts in performing this function, as a preliminary matter it places enormous trust in the NCAA's own assessments of whether a rule preserves amateurism and assumes that any "amateurism" rule does in fact have a procompetitive effect.[236] Given that the NCAA cannot arrive at a consistent version of the amateurism principle—and that other courts have found that NCAA rules justified as amateurism or mere eligibility rules in fact have an impermissible anticompetitive effect—the presumption of procompetitiveness extended to amateurism rules emerges as a seriously misguided enterprise.

Ultimately, these inconsistencies complicate the antitrust picture for the NCAA's amateurism rules. As discussed, the presumption of procompetitiveness advanced by the Seventh Circuit and other courts is based on the notions that collegiate athletics are a worthwhile enterprise and that the NCAA needs latitude to protect the amateur character of its particular product.[237] By its very nature, this deference seems to logically require that some governing body must be able to parse those rules that have a procompetitive effect on college sports by preserving amateurism from those that do not. If *Deppe* really means what it says, then no such governing body would truly exist.

B. Alston's reading of Board of Regents and method of reviewing NCAA rules is more faithful to the law and fairer to student-athletes

Unlike *Deppe* and earlier cases that have applied the presumption of procompetitiveness doctrine to NCAA eligibility rules, *Alston I* and *II* proceeded

CBS (Apr. 28, 2021, 5:31 PM), https://www.cbssports.com/college-football/news/ncaa-board-of-directors-ratifies-one-time-transfer-legislation-allowing-athletes-immediate-eligibility/ [https://perma.cc/T9RM-TT5Y].

232. *See* Amy Howe, *Amid March Madness, Antitrust Dispute Over College Athlete Compensation Comes to the Court*, SCOTUSBLOG (Mar. 30, 2021, 12:56 PM), https://www.scotusblog.com/2021/03/amid-march-madness-antitrust-dispute-over-college-athlete-compensation-comes-to-the-court/ [https://perma.cc/4RW6-WGSR].

233. 802 F.3d 1049, 1058 (9th Cir. 2015).

234. 958 F.3d 1239, 1249 (9th Cir. 2020).

235. *Id.* at 1248; *O'Bannon II*, 802 F.3d at 1056.

236. *Deppe*, 893 F.3d at 502 ("[M]ost NCAA eligibility rules are entitled to the procompetitive presumption . . . because they define what it means to be a student-athlete and thus preserve the tradition and amateur character of college athletics.").

237. *See* discussion *supra* at Section III.A.

by reviewing the antitrust challenge to the NCAA's grant-in-aid restrictions through the standard route established in *Board of Regents*: a rule-of-reason analysis under § 1 of the Sherman Act.[238] In doing so, *Alston* takes its power from the clear holding of *Board of Regents*, not the dicta, and appropriately balances the anticompetitive and procompetitive aspects of the NCAA grant-in-aid cap to arrive at a tailored decision in light of the rule's actual effect.[239]

First, the court in *Alston I* properly continued the effort to recenter the debate about NCAA eligibility rules around the core holding of *Board of Regents*.[240] At its most basic level, *Board of Regents* stands for the proposition that when reviewing NCAA rules under § 1 of the Sherman Act, the proper procedure is to apply the rule of reason as part of the fundamental exercise of "form[ing] a judgment about the competitive significance of the restraint."[241] In order to satisfy this core purpose, the full burden-shifting analysis of the rule of reason must be implemented because without it a true picture of the restraint's impact is impossible to gauge.

Particularly at the second step of the rule of reason, *Alston I* went to some lengths to explain that facts must be weighed to find whether the challenged NCAA rules truly are procompetitive.[242] This discussion focused on the point that the Supreme Court did not just insist that "the NCAA bears a 'heavy burden' of 'competitively justify[ing]' its undisputed 'deviation from the operations of a free market'"[243] in a hypothetical sense, but that the NCAA must make a specific showing that "the challenged rules themselves . . . have procompetitive benefits."[244] The emphasis on this step is key because it recognizes that a hypothetical presumption of competitiveness short-circuits the entire idea of the rule of reason—the fact-intensive inquiry to balance competitiveness and anticompetitiveness concerns—for which *Board of Regents* truly stands.

Furthermore, even with *Alston I*'s effort to refocus on *Board of Regents*'s holding that the rule of reason guides courts in scrutinizing NCAA rules, it by no means forecloses the possibility that many—even most—NCAA rules designed to promote amateurism could be upheld as reasonable restraints of trade.[245] Indeed, the *Alston I* decision referred back to both the Ninth Circuit's earlier decision in *O'Bannon II*, which added that "amateurism rules are likely to be procompetitive,"[246] and *Board of Regents*'s own estimation that a host of NCAA rules—from the "size of the field" to requirements that athletes "must be required to attend class"—indeed "*can* be viewed as procompetitive."[247] Thus, the Ninth Circuit compellingly demonstrates that even if *Board of Regents*

238. *Alston I*, 958 F.3d at 1244; *Alston II*, 141 S. Ct. 2141, 2144 (2021).

239. *See Alston I*, 958 F.3d at 1246.

240. *Id.* at 1258.

241. NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 103 (1984) (quoting Nat'l Soc'y Pro. Eng'rs v. United States, 435 U.S. 679, 692 (1978)).

242. *Alston I*, 958 F.3d at 1257.

243. *Id.* (quoting *Bd. of Regents*, 468 U.S. at 113).

244. *Id.* at 1259.

245. *Alston I*, 958 F.3d at 1246; *see Alston II*, 141 S. Ct. 2141, 2156 (2021).

246. *Alston I*, 958 F.3d at 1246 (quoting *O'Bannon II*, 802 F.3d 1049, 1053 (9th Cir. 2015)).

247. *Id.* at 1246; *Bd. of Regents*, 468 U.S. at 101–02 (emphasis added).

contemplated that many NCAA rules justified by amateurism would prevail at this stage, it does not endorse the view that such justifications should allow the NCAA to be *exempt* from further scrutiny at this stage as a preliminary matter.[248]

Additionally, *Alston I*'s adherence to the traditional rule-of-reason approach when scrutinizing NCAA rules has another key benefit: by proceeding to the "less restrictive alternative phase" of the analysis, it produces a more genuine balance of the competition concerns that drive antitrust law.[249] Consider the case where a restraint of trade serving a purpose closely tied to amateurism concerns, like the grant-in-aid issue in *Alston I* and *II*, is found to be unreasonable; even in this situation, less restrictive alternatives may still be found to ease the burden placed by the regulation on the relevant market while still respecting the underlying purpose of that regulation. In *Alston I* itself, this alternative solution was comprised of a proposal to lift the grant-in-aid cap with regard to education-related expenses but affirm the NCAA's ability to prohibit cash compensation and other awards untethered from educational expenses which could "morph into professional-like salaries" if left unchecked.[250]

This way of thinking about NCAA rules is even more attractive when one considers how mercurial the NCAA's own definition and application of amateurism truly is. Pressure from outside of the NCAA[251] and the sheer amount of money flowing through the college sports market no doubt play a role in constant changes to NCAA rules.[252] From the changes in transfer rules discussed above[253] to the changes in regulation of agents,[254] the NCAA has a habit of passionately defending the need for a particular rule promoting amateurism, only to discard it later.[255] *Alston I*'s call for a return to a full rule-of-reason analysis for NCAA rules better comports with this reality because it recognizes the need to balance the anticompetitive and procompetitive aspects of amateurism rules—something that the NCAA is plainly doing in the background—despite its ardent arguments that courts should have no authority to strike down NCAA rules designed to further the ideal of amateurism.[256]

248. *See Alston I*, 958 F.3d at 1246.

249. *See id.* at 1251.

250. *Id.*

251. *See, e.g.*, David Furones, *Florida Gov. Ron DeSantis Signs Bill That Allows College Athletes to Earn Endorsements*, S. FLA. SUN-SENTINEL (June 12, 2020, 1:26 PM), https://www.sun-sentinel.com/sports/miami-hurricanes/fl-sp-desantis-ncaa-name-image-likeness-20200612-sklikkmwnvaujhjo2767q3v3ym-story.html [https://perma.cc/TFD7-L7WD].

252. Virginia A. Fitt, Note, *The NCAA's Lost Cause and the Legal Ease of Redefining Amateurism*, 59 DUKE L.J. 555, 567 (2009).

253. *See* discussion *supra* Section III.A.

254. *See* Billy Witz, *Will New N.C.A.A. Rules Really Keep Agents and Boosters at Bay?*, N.Y. TIMES (May 1, 2020), https://www.nytimes.com/2020/05/01/sports/ncaa-paying-athletes-boosters.html [https://perma.cc/TCQ6-RRDN].

255. *Compare* Brief of Defendant-Appellee at 7, Deppe v. NCAA, 893 F.3d 498 (No. 17-1711) (7th Cir. 2018) (arguing that the year-in-residence rule is a presumptively procompetitive rule essential to the continued existence of college football), *with* Caron, *supra* note 227 (observing that the NCAA's newly liberal transfer waiver policy undermines the old year-in-residence requirement).

256. 958 F.3d 1239, 1256 (9th Cir. 2020).

IV. RECOMMENDATION

An increasing level of scrutiny is being directed at the ways in which the NCAA's rules restrict compensation,[257] many of which are justified on an amateurism basis.[258] In such a situation, it is utterly nonsensical for courts to continue to shield a separate class of eligibility rules from close examination. These rules can be both closely related to compensation rules in their philosophical underpinnings and can have an anticompetitive impact in practice, even if these impacts have been dismissed out-of-hand by some courts.[259] Thus, courts should break with the interpretation of *Board of Regents* that devises a presumption of procompetitiveness to NCAA eligibility rules. In its place courts should extend the straightforward rationale *Alston I* and *II* applied to NCAA scholarship limits to the wider universe of amateurism and eligibility rules instituted by the NCAA.[260] Thus, in keeping with the intent of the Sherman Act, all challenged NCAA rules should be open to examination under the full rule-of-reason analysis and an inquiry into their competitive effect, regardless of their subject matter.

As discussed, many courts have interpreted *Board of Regents*' musings about the NCAA's "critical role in the maintenance of a revered tradition of amateurism in college sports" and insistence that "it needs ample latitude to play that role"[261] to create a per se rule that NCAA eligibility rules should benefit from a preferential presumption of procompetitiveness.[262] But upon examining the current state of college athletics, it is essentially only the courts that adhere to this idealized tradition.[263] The NCAA, for its own part, has modified its definition of amateurism again and again in the face of changes in the college-sports marketplace.[264] Furthermore, the NCAA has at times even encouraged the chief "evil" decried by Charles Eliot—commercialism in college sports—for example, by negotiating larger and larger television contracts for its flagship men's and women's Division I basketball tournaments.[265]

Ultimately, it is in the face of this growing profitability and commercial potential of college athletics that the rationale for upholding the presumptive procompetitiveness of NCAA eligibility rules is shown to be irredeemably hollow. Because, in essence, numerous sports sponsored by the NCAA have

257. *See, e.g.*, *O'Bannon II*, 802 F.3d 1049, 1053 (9th Cir. 2015).

258. NAT'L COLLEGIATE ATHLETIC ASS'N, *supra* note 1, at § 2.9.

259. Deppe v. NCAA, 893 F.3d 498, 503 (7th Cir. 2018).

260. *See Alston I*, 958 F.3d at 1244; *Alston II*, 141 S. Ct. 2141, 2163 (2021).

261. NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 120 (1984).

262. *Deppe*, 893 F.3d at 502.

263. *See, e.g.*, Witz, *supra* note 254.

264. Crabb, *supra* note 34, at 197.

265. *See* Frank Pallotta, *NCAA Extends March Madness TV Deal with Turner, CBS Until 2032*, CNN (Apr. 12, 2016, 3:30 PM), https://money.cnn.com/2016/04/12/media/ncaa-march-madness-turner-cbs/index.html [https://perma.cc/BAL6-S6LH]; Lucas Shaw, *ESPN, NCAA Extend Deal Through 2023-2024*, REUTERS (Dec. 15, 2011, 5:36 PM), https://www.reuters.com/article/us-espn-ncaa/espn-ncaa-extend-deal-through-2023-24-idUSTRE7BE2FM20111215 [https://perma.cc/E9DV-7R2A].

become de facto professionalized.[266] The NCAA, its member institutions, and certain figures within this ecosystem have reaped the benefits of this quasi professionalization of amateur sports.[267] As discussed above,[268] coaches, administrators, and contractors have long cashed in on this development,[269] often at compensation levels that compare favorably with their best-salaried counterparts in professional sports.[270] But while these figures have benefitted, the student-athletes—without whom this ecosystem could not function—are still denied the basic tools they need to protect and advocate for themselves in this market.[271] Crucially, it is the NCAA amateurism and eligibility rule systems that impose key restraints.[272] The year-in-residence rule serves as an example of an approved restraint that in fact does have an anticompetitive effect[273] and prevents student-athletes from freely operating in this market by placing restrictions on the ease with which players may move between the only buyers of their services: NCAA member institutions.[274]

Many commentators have advanced proposed solutions for the problems of NCAA rule-making, with many zeroing in on the problems caused by the NCAA's fraught model of amateurism.[275] Others have offered remedies for the NCAA's antitrust predicament ranging from seeking a partial antitrust exemption from Congress to stabilize the role of amateurism in college sports[276] to replacing the NCAA with either a "streamlined and deregulated association"[277] or a "federally chartered non-profit organization, similar to the United States Olympic Committee"[278] to assume governance over college

266. Mark Woods, *It's a Little Late for NCAA to Decry the 'Professionalization of College Athletics'*, FLA. TIMES-UNION (Nov. 2, 2019, 3:02 PM), https://www.jacksonville.com/news/20191102/mark-woods-its-little-late-for-ncaa-to-decry-professionalization-of-college-athletics [https://perma.cc/SEW7-LPPL].

267. *See* Crabb, *supra* note 34, at 212–13; Samuel Stebbins, *College Coaches Dominate List of Highest-Paid Public Employees with Seven-Digit Salaries*, USA TODAY (Sept. 23, 2020, 7:00 AM), https://www.usatoday.com/story/money/2020/09/23/these-are-the-highest-paid-public-employees-in-every-state/114091534/ [https://perma.cc/7LJY-86WS].

268. *See* discussion *infra* Section II.A.

269. *See* Crabb, *supra* note 34, at 212–13.

270. *Cf.* Pranav Nayar, *NBA Head Coach Salary: What Is the Average NBA Coach Salary?*, SPORTSRUSH (July 21, 2020), https://thesportsrush.com/nba-news-nba-head-coach-salary-what-is-the-average-nba-coach-salary/ [https://perma.cc/X8R6-6GS8].

271. *See, e.g.*, Blair & Wang, *supra* note 7, at 2.

272. *See id.* at 2–3 (describing how the NCAA year-in-residence rule prevented Peter Deppe from joining another team when his former school informed him that they were recruiting a player to replace him.).

273. *Id.* at 14.

274. Katherine Kargl, Note, *Is Amateurism Really Necessary or Is It an Illusion Supporting the NCAA's Anticompetitive Behaviors?: The Need for Preserving Amateurism in College Athletics*, 2017 U. ILL. L. REV. 379, 400 (2017).

275. *See, e.g.*, Crabb, *supra* note 34, at 204–05 (arguing that the NCAA alter its rules regime by expanding compensation to athletes and adopting an Olympic view of amateurism); Erin Abbey-Pinegar, Note, *The Need for a Global Amateurism Standard: International Student-Athlete Issues and Controversies*, 17 IND. J. GLOB. LEGAL STUD. 341, 341–62 (2010) (suggesting that an international standard be implemented to encompass all student-athletes that may compete at an NCAA institution).

276. Kargl, *supra* note 274, at 410–11.

277. Roger I. Abrams, *Sports Law Issues Just Over the Horizon*, 3 VA. SPORTS & ENT. L.J. 49, 57 (2003).

278. Donna A. Lopiano, *Fixing Enforcement and Due Process Will Not Fix What Is Wrong with the NCAA*, 20 ROGER WILLIAMS U. L. REV. 250, 269 (2015).

athletics. Still, this Note maintains that the best option is neither to reinvent the definition of amateurism for a new age nor to tear down the NCAA. Rather, the best way forward is to redouble efforts to apply antitrust scrutiny in an impartial way across all rules instituted by the NCAA and in doing so finally remove the presumption of procompetitiveness.

This strategy is the best option because it both returns antitrust treatment of the NCAA to the standard devised in *Board of Regents* and allows room for the antitrust review of amateurism rules to change as the circumstances surrounding college sports change.[279] If one were to address the problem of NCAA amateurism rule-making by merely supplanting its definition of amateurism, there is no question that the present tension around NCAA amateurism rules—like grant-in-aid—would simply arise again because a static definition of amateurism will always invite challenge in a dynamic environment like college sports. Over the past hundred years, the NCAA's definition of amateurism has created controversy both because it has evolved in some ways since the organization's founding era[280] and because in other ways the NCAA has refused to change this definition despite new circumstances[281]—this is unlikely to change. Thus, the solution must be to rely on the judicial antitrust framework through which the NCAA's rules are examined on a case-by-case basis to foster a more competitive marketplace and reach fairer outcomes for market participants, above all the student-athletes themselves.

Under an *Alston* analysis, the biggest change from *Deppe* and its forebearers is the opening question asked by the courts.[282] In an *Alston*-type framework, a court would first proceed by inquiring if the challenged NCAA rule has any anticompetitive effects[283]—not whether the rule can be considered similar to other amateurism or eligibility rules blessed by the courts on previous occasions.[284] If the rule is obviously competitive or obviously procompetitive, as many of the NCAA's amateurism and eligibility rules undoubtedly are,[285] courts can swiftly dispose of the case using the "quick look" or abbreviated rule-of-reason standard of review.[286] The ability to engage in this abbreviated look allows for some flexibility to balance between the need to scrutinize the effect that the NCAA's rules have and the practical necessity of avoiding the substantial costs of litigating a full rule-of-reason inquiry for a rule that may easily pass antitrust review.

This approach also allows courts the room to pivot. If the competitive impact of a restraint is not black and white, the court's inquiry can become more

279. *See Alston I*, 958 F.3d 1239, 1265–66 (9th Cir. 2020).

280. *See* Braziller, *supra* note 8 (describing how proposed changes to the NCAA's name, image, and likeness compensation rules have not satisfied the organization's critics).

281. *See* Shropshire, *supra* note 40, at 46–47 (detailing the NCAA's long-standing insistence that "tuition and fees, room and board" are the only forms of compensation permitted for amateurs).

282. *Compare Alston I*, 958 F.3d at 1248, *with* Deppe v. NCAA, 893 F.3d 498, 502 (7th Cir. 2018).

283. *Alston I*, 958 F.3d at 1248.

284. *Deppe*, 893 F.3d at 502.

285. *See* NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 102 (1984).

286. *Id.* at 109 n.39.

nuanced and employ the full rule-of-reason balance-shifting analysis to weigh the procompetitive and anticompetitive impacts of the rule in question. Preserving the option to proceed to this kind of a review is another strength of *Alston I* because some NCAA amateurism rules are not invariably procompetitive or essential to the preservation of a market for its product.[287] In fact, their procompetitive potential notwithstanding, these rules can and have been shown to be more anticompetitive than not and may require modification to arrive at a less restrictive alternative, as the Ninth Circuit found in *Alston* itself.[288]

Furthermore, opening up amateurism rules to the same level of scrutiny that the NCAA's commercial rules receive is unlikely to have a damaging effect on the core product in question: amateur athletics. Courts have recognized time and again that those restraints essential to the creation or provision of the product itself may be looked upon kindly, even if they have an anticompetitive effect.[289] This is doubly true of intercollegiate athletics, as *Board of Regents* took pains to explain that the NCAA must have the authority to devise and implement rules to preserve amateur athletics in the United States.[290] Where *Alston* makes the key difference is that the NCAA should not benefit from a presumption that the restraints that it claims serve amateurism do in fact promote amateurism—even in the areas of its rule-making that most closely align with the definition of what an amateur athlete fundamentally means.[291]

The greatest shortcoming of this Note's recommendation, however, is its potential to balloon costs. Antitrust enforcement is notoriously expensive[292] and can frequently lead to protracted civil litigation.[293] If the NCAA's eligibility rules were further exposed to antitrust scrutiny, much of which would be unlikely to find anticompetitive effect,[294] the NCAA could be dragged into needless and costly litigation. These new court battles could potentially reduce the effectiveness of the NCAA as the guarantor of the college-sports product and thus have a boomerang negative impact on the student-athletes that this approach seeks to treat more fairly. The cost argument is a valid one, but the benefits of the *Alston* approach ultimately outweigh the risks it poses to the NCAA. The creation of a more agile and aggressive antitrust enforcement posture *vis-à-vis* the NCAA is in the end a tool to create more efficiencies within the college-sports marketplace—and if the estimations of efficiency gains from changing compensation rules are any guide—the gains from examining the NCAA's wider web of eligibility rules could be substantial.[295]

287. Baker et al., *supra* note 68, at 697–99.

288. *Alston I*, 958 F.3d at 1265.

289. *Bd. of Regents*, 468 U.S. at 101.

290. *Id.* at 120.

291. *Alston I*, 958 F.3d at 1265 (holding that notwithstanding the relation of grant-in-aid to amateurism concerns, the challenged restraints did not comport with the requirements of the Sherman Act).

292. Jonathan M. Jacobson, *Tackling the Time and Cost of Antitrust Litigation*, 32 ANTITRUST 3, 3 (2017).

293. *Id.*

294. *See Bd. of Regents*, 468 U.S. at 117.

295. Cristian J. Santesteban & Keith B. Leffler, *Assessing the Efficiency Justifications for the NCAA Player Compensation Restrictions*, 62 ANTITRUST BULL. 91, 92 (2017).

V. CONCLUSION

NCAA rules intended to safeguard amateurism and govern athlete eligibility present a quandary to many courts as they examine these regulations for their competitive effect in the college-athletics marketplace.[296] Although one reading of the bedrock Supreme Court *Board of Regents* opinion allows these regulations to benefit from presumption of procompetitiveness, and thus be shielded from a deeper examination of their true competitive effect,[297] this reading ultimately fails both as an errant interpretation of *Board of Regents* and as a reading with unsound policy implications for the modern intercollegiate athletics industry[298] Instead, it is preferable that NCAA rules designed to implement amateurism, eligibility standards, or other essential elements of the amateur collegiate sports industry be examined in the manner that the Ninth Circuit and Supreme Court have employed when reviewing NCAA rules.[299] Most explicitly in the recent *Alston* rulings, these courts have chosen to review an amateurism-related rule capping grant-in-aid using the standard established by *Board of Regents* for rules mandated by the NCAA: the unencumbered rule of reason under § 1 of the Sherman Act.[300] Although this approach may increase costs for the NCAA as the guardian of amateur athletics, removing the presumption of procompetitiveness is the best option for arriving at the appropriate balance between the competing interests at play in the modern college sports market.

296. *See generally Bd. of Regents*, 468 U.S. 85; *Alston I*, 958 F.3d 1239.
297. Agnew v. NCAA, 683 F.3d 328, 341 (7th Cir. 2012) (citing *Bd. of Regents*, 468 U.S. at 117).
298. *O'Bannon II*, 802 F.3d 1049, 1064 (9th Cir. 2015).
299. *Id.* ("'The amateurism rules' validity must be proved, not presumed."); *Alston I*, 958 F.3d at 1265.
300. *See Alston I*, 958 F.3d at 1265.